IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM ROBERT BILL	:	
Plaintiff	:	
vs.	:	
	:	CIVIL ACTION NO. 05-154E
TROOPER VICTOR STERNBY	:	
Defendant	:	

ORDER

AND NOW, to wit, this day of , 2006, upon consideration of Defendant's Motion for Summary Judgment and Plaintiff's Response thereto, it is hereby ORDERED and DECREED, that Defendant's Motion is denied in its entirety.

BY THE COURT

____
Sean J. McLaughlin, J.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM ROBERT BILL Plaintiff	:
vs.	:
	: CIVIL ACTION NO. 05-154E
TROOPER VICTOR STERNBY Defendant	:

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

AND NOW, comes the Plaintiff, hereby responding to Defendant's Motion for Summary Judgement as follows:

1. Plaintiff incorporates his response to Defendant's Statement of Undisputed Facts and his brief in opposition to Defendant's Motion for Summary Judgment as if more fully set forth herein.

2-3. Denied. The averments contained in this paragraph are conclusions of law and deemed denied as such by the Federal Rules of Civil Procedure and no answering averments are required.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion for Summary Judgment.

Respectfully submitted by:
KANE & SILVERMAN, P.C.

By: S/Steven C. Feinstein
Steven C. Feinstein, Esquire

IN THE UNITED STATES DISTRICT COURT FOR
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WILLIAM ROBERT BILL	:	
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vs.	:	
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TROOPER VICTOR STERNBY	:	
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PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. FACTS

On or about February 22, 2003, Plaintiff was stopped on the side of the road sleeping, when Defendant, Trooper Victor Sternby, woke him up. At the time that Plaintiff was woken up by Defendant, Trooper Victor Sternby, Plaintiff was in a state of extreme intoxication. After Defendant, Trooper Victor Sternby, woke Plaintiff, he (Sternby) immediately began an investigation that lead to the arrest of Plaintiff for driving a vehicle under the influence of alcohol, in violation of 75 PaCSA § 3531. When Plaintiff was woken by Defendant, Trooper Victor Sternby, he was in such a state of intoxication that it should have been obvious to Defendant, Trooper Victor Sternby, that it was unsafe to allow Plaintiff to stand and/or walk on the roadway. On the date aforesaid, despite the obvious intoxication of Plaintiff, Defendant, Trooper Victor Sternby, required Plaintiff to stand and/or walk on the roadway. While Plaintiff was standing on the roadway, he was caused to slip and fall, striking his head, on roadway, and as result thereof, suffered severe and permanent injuries.

It is believed that Defendant, Trooper Victor Sternby, knew or should have known that by requiring Plaintiff to stand and/or walk on the roadway, Plaintiff was at risk for falling and suffering injuries. In fact, Plaintiff's state of intoxication was such that a lay person could or should easily have recognized the risk of danger of having Plaintiff stand and/or walk on the roadway. At all times relevant hereto, Plaintiff should have been provided proper safeguards for his safety and/or provided proper care, medical or otherwise, while in the custody of Defendants against his will.

Defendant had actual knowledge of Plaintiff's state of intoxication. Despite said knowledge Defendants failed to take necessary and available precautions to protect Plaintiff, as is required by Fourth, Eighth and Fourteenth Amendments to the United States Constitution. As a direct result of all named Defendants' conduct described above, Plaintiff suffered great significant and permanent personal injuries.

Plaintiff brought suit seeking damages for violation of his rights under the Federal Constitution under the State Created Danger Doctrine.

II. LAW

In Federal Court, Motions for Summary Judgment are governed by Federal Rule of Civil Procedure 56, which provides in pertinent part:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of

liability alone although there is a genuine issue as to the amount of damages.
FRCP Rule 56

This also creates the standard for granting the motion--that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See also Edwards v. Aguillard 482 U.S. 578, 107 S.Ct. 2573 (1987), Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp. 475 U.S. 574, 106 S.Ct. 1348 (1986). However, in deciding a Motion for Summary Judgment, the Court must look at the evidence in the light most favorable to the non moving party when deciding if there are material facts in dispute. Wall v. Dauphin County 2006 WL 347626 (3rd Cir.(Pa.)). The Court must draw all reasonable inferences from the evidence in favor of the nonmoving party and may not weigh the evidence or assess credibility. See Abraham v. Raso, 183 F.3d 279, 287 (3d Cir.1999); Petruzzi's IGA Supermarkets, Inc. v. Darling-Del. Co., 998 F.2d 1224, 1230 (3d Cir.1993). Based on this standard, Defendant's Motion for Summary Judgment must be denied.

In the case at bar, while Plaintiff was not injured as a result of unreasonable force used by the arresting officer, Plaintiff was injured as a result of unreasonable conduct on the part of the officer. Specifically, the Trooper ignored the risk to the Plaintiff, removed him from his vehicle and placed him into a position of jeopardy. This is contrary to well established principles of law.

In § 1983 actions, liability under state-created danger theory is predicated upon States' affirmative acts that work to a person's detriment in terms of exposure to danger. Robbins, v. Cumberland County Children and Youth Services, 802 A.2d 1239 (Cmwlth. Ct. 2002). In order to prevail in this case, Plaintiff must satisfy a four prong test:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; [and] (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the [harm to have occurred].

See Kamara v.Attorney General of the United States 420 F.3d 202 (3rd Cir 2005), Webb, Jr. v. City of Philadelphia.1999 WL 793466 (E.D.Pa. 1996).

Under this theory, a Plaintiff seeking to recover for denial of substantive due process rights must show that state actor acted with willful disregard for or deliberate indifference to Plaintiff's safety that rises to level of shocking the conscience, Pahler v. City of Wilkes-Barre; 31 Fed.appx. 69, 2002 Wl 389302 (3rd Cir.2002). Defendant argues that it is entitled to Summary Judgment because he cannot, as a matter of law, meet this burden. However, in this case, Plaintiff will be easily able to prove each and every element of this cause of action.

This case is substantially similar to Kneipp v. Tedder 95 F. 3rd 1199 (3rd Cir. 1996), where an officer allowed an obviously intoxicated individual to walk home alone. Tragically, in Kneipp, the Plaintiff was killed when she fell. It is submitted that the actions of Trooper Sternby were even worse in this case.

In this case, Trooper Sternby took a person who was obviously intoxicated from a position of safety and placed in him into a position of danger. This is contrary to his obligation as a State Trooper, see Simmons v. City of Philadelphia 728 F.Supp. 352 (E.D. Pa 1990). However, this is made far worse by the precise facts of this case.

Specifically, in this case, Trooper Sternby removed Plaintiff from the truck in order to give him a field sobriety test. Plaintiff was so intoxicated that he could not understand the Trooper's instructions, let alone complete the field sobriety test. Despite this, Trooper Sternby, disregarding any risk of danger to the Plaintiff, ordered him to walk to the front of the Trooper's car, unescorted. It was during this walk that Plaintiff fell and struck his head. The ***reason*** why this was allowed to happen are absolutely shocking ***and*** shows that Trooper Sternby does not even have a basic understanding of the law.

At the time that Trooper Sternby allowed Plaintiff to walk unescorted to the front of the Trooper's car, Trooper Sternby was headed to the car in order to get the equipment to do a Preliminary Breathalyzer Test ("PBT"). Prior to this, Plaintiff exhibited numerous characteristics of being intoxication. However, despite Plaintiff's appearance and inability to do the field sobriety tests, Trooper Sternby believed that he need the PBT in order to establish probable cause[1] to ask for a blood test to determine Plaintiff's blood alcohol content. It is shocking and amazing that Trooper Sternby did not believe that he had probable cause[2] to ask for the blood test long before he went to

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[1]Trooper Sternby's deposition was taken February 28, 2005. A copy of the transcript was attached to Defendant's Motion for Summary Judgment. See page 56, line 24through page 57 line 25.

[2]. On page 18 of the transcript, Trooper Sternby was asked to describe what he looks for in determining whether a driver is operating a vehicle while intoxicated. His answer included blood shot eyes, slurred speech, poor coordination, short term memory loss, odor of alcoholic beverages, difficulty in retrieving documents, disheveled clothing and disorientation. Beginning on page 33 of the transcript, Sternby described Bill's appearance as disoriented, having a disheveled appearance, unsteady on his feet, sleepy, sluggish, strong odor of alcohol, difficulty with cards, unsure footing, slurred speech and leans/holds the vehicle and staggers. Each of these things were noted before the attempted field sobriety tests and before Plaintiff fell.

Beginning on page 39, Trooper Sternby describes his attempts at getting Bill to perform field sobriety tests. None of the tests were completed. By the time that Sternby go through the perform the PBT[3]. In addition, there is no legitimate excuse for why the PBT could have been performed while the Plaintiff was seated inside the Trooper's car. And yet, this gets even worse.

According to Trooper Sternby, the reason that he allowed Plaintiff to walk ***unescorted*** was because he was concerned how it would appear on the tape and whether it would affect the validity of his arrest of Plaintiff for DUI[4]. The overall theme of Trooper Sternby's version of the incident was that he was ***far*** more concerned about the validity of Plaintiff's arrest than he ever was about the Plaintiff's safety. Accordingly, he callously disregarded any actual danger that Plaintiff was placed in order to do things that were not even necessary.

Defendant's Motion for Summary Judgment states that Plaintiff cannot meet several of the prongs of the test as a matter of law, beginning with the "deliberate indifference" standard. It is submitted that any time a police officer or member of a law enforcement agency is ***more*** concerned about the validity of an arrest than the safety of the citizenry that it is supposed to protect, there is deliberate indifference. In this case, despite Trooper Sternby's deposition testimony, a jury could clearly come to the conclusion that he knew of and did not care even one iota about the safety of the Mr. Bill[5]. However, any analysis of this issue, necessarily requires that there be a determination of

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attempts to do the field sobriety tests, he was fairly certain that Bill was too intoxicated to drive safely. Page 40, line 20.

[3]Trooper Sternby knew that he could get convictions without a PBT or even a blood test. Deposition Transcript 58 lines 8-20.

[4]Deposition Transcript, page 55, lines 4-14.

[5]It is also submitted that Trooper Sternby's testimony cannot, by itself support summary judgment. In order for this Court to grant summary judgment based on the testimony of Trooper Sternby, it would have to make a credibility determination. This is the exclusive province of the jury. . See Abraham v. Raso, 183 F.3d 279, 287 (3d Cir.1999).

Trooper Sternby's intent at the time of the action. This also precludes summary judgment.

In Justofin v. Metropolitan Life Ins. Co. 372 F.3d 517 (3rd Cir. 2004), the Third Circuit said that a party's "state of mind is an issue of fact for the jury; the issue of intent is particularly inappropriate for resolution by summary judgment because evaluating state of mind often requires the drawing of inferences from the conduct of parties about which reasonable persons might differ". See also Subbe-Hirt v. Baccigalupi 94 F.3d 111(3rd Cir. 1996) (Question of intent precludes Summary Judgment). There is no difference here. Trooper Sternby's state of mind is at issue and summary judgment is not appropriate.

Defendant also contends that the harm was not foreseeable. Defendant is asking the Court to accept the principle that it was not foreseeable that a person in a high state of intoxication, who could not perform or even comprehend the directions for a field sobriety test would fall. Defendant wants this Court to rule that, ***as a matter of law***, it was not foreseeable that a person with a blood alcohol content of .25 might fall down[6]. Defendant cites absolutely no authority for this principle.

There have been cases where a Court has ruled that the harm that occurred is not foreseeable for the purposes of a § 1983 action[7] but never under circumstances such as this one. This specific

[6]Interestingly, Defendant appears to admit the harm was foreseeable. On page 12 of Defendant's brief, he acknowledges this danger when he stated that "when an officer requires a suspected intoxicated person (even one suspected of being very intoxicated) to exit a vehicle, perform FST's and even stand in front of the patrol car in camera view without supporting or holding the individual, there is certainly a risk that the individual may stumble and fall. In addition, Trooper Sternby admitted that he thought of the possibility that Bill would fall and hurt himself, but that "It wasn't a great concern at that time." Deposition transcript page 54, lines 9-10.

[7]See e.g. Bright v. Westmoreland County 380 F.3d 729 (3rd Cir. 2004).

action was found to be foreseeable in Kneipp v. Tedder 95 F. 3rd 1199 (3rd Cir. 1996), where an intoxicated person, left to walk home alone, fell and died. The relationship between intoxication and falling is well established and certainly should not be questioned in this case. In fact, The Third Circuit has denied Motions for Summary Judgment where the consequences of the action are far more unexpected than they are in this one.

For example, in Estate of Smith v. Marasco 318 F.3d 497 (3rd Cir 2002) the Third Circuit ruled that there was a genuine issue of material fact as to whether fatal heart attack suffered by suspect was a foreseeable consequence of state police officers' conduct of arriving at suspect's residence with a helicopter, using bright lights, breaking windows, and using tear gas, which precluding summary judgment for officers in substantive due process claim under state-created danger doctrine. In addition, in the very recent case of Pascocciello v. Interboro School Dist. 2006 WL 1284964 (E.D.Pa. 2006), the Eastern District allowed a cause of action to continue against an individual who wrote a letter of recommendation in 1975 for an individual who was accused of sexually molesting an individual more than 20 years later, saying that the conduct was foreseeable and the passage of time did not make the harm too remote to be actionable. Certainly the case at bar presents a situation which was more foreseeable and immediate than the situations presented in either Marasco or Pascocciello.

Next, Defendant argues that Sternby did not create the opportunity for Harm that otherwise did not exist. Once again, Defendant cites principles of law but does not support the arguments as to why or how the facts of this case fit into the principles. Defendant makes the bold statements and then does not back them up with facts. The facts of this case are quite to the contrary.

It is undisputed that Trooper Sternby came across Bill while Bill was asleep in his truck. Therefore, when Trooper Sternby found Bill, Bill was in a position of ***absolute*** safety. Bill had a disheveled appearance and exhibited a number of classic criteria of being intoxicated. At that moment, Trooper Sternby had probable cause to request a blood test. If Trooper Sternby had simply escorted Bill to the patrol car, placed him inside, and obtained permission to get the blood test, Bill would never have been injured. However, instead of doing the thing that was logical, reasonable and legal, Sternby allowed Bill to walk unescorted despite his obvious extreme intoxication. Had Sternby not acted in the manner that he did, Bill would never have been in ***any*** position of danger, notwithstanding Defendant's arguments to the contrary. The only thing that placed Bill in the position of danger was the actions of Sternby. At the very least, this is a material fact in dispute which precludes summary judgment.

Lastly, Defendant argues that he is entitled to qualified immunity because the law, as it existed in 2003, did not give "fair warning" to the Trooper that his conduct was unconstitutional. This argument is without merit. Ever since the Kneipp decision in 1996 law enforcement officers have been on notice that their actions in placing intoxicated persons in danger is unconstitutional.

At the core of this case is the role we want our law enforcement officers to play. Do we want these representatives of the state to be there to serve and to protect the citizens or to disregard that obligation in favor of the pursuit of getting convictions. The case law says it is the former and the facts of this case show that Trooper Sternby violated that obligation and as result thereof, Plaintiff suffered serious injuries.

III. CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Honorable Court Deny Defendants' Motion in its entirety.

Respectfully submitted by:
KANE & SILVERMAN, P.C.

By: S/Steven C. Feinstein
Steven C. Feinstein, Esquire
Attorney for Plaintiff

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THE WESTERN DISTRICT OF PENNSYLVANIA

WILLIAM ROBERT BILL	:	
Plaintiff	:	
	:	
vs.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA	:	CIVIL ACTION NO. 05-154E
DEPARTMENT OF STATE POLICE,	:	
et. al.	:	
Defendants	:	

CERTIFICATE OF SERVICE

I, Steven C. Feinstein, Esquire, certify that on this 17th day of May, 2006, I forwarded a copy of Plaintiff's Response to Defendants' Motion For Summary Judgment to the following:

Mary Lynch Friedline
564 Forbes Avenue, Manor Complex
Pittsburgh, PA 15219

Respectfully submitted by:
KANE & SILVERMAN, P.C.

By: S/Steven C. Feinstein
Steven C. Feinstein, Esquire
Attorney for Plaintiff